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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION,
Petitioner,

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY and SOLAR ELECTRIC COMPANY,
Respondents.

RESPONDENTS' BRIEF

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Opinion Below

The opinions below are reported at 94 Fed. (2d) 943 (advance sheets of April 4, 1938).

Jurisdiction

The case is here on a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit. Jurisdiction is invoked by petitioner under Section 240(a) of the Judicial Code, as amended (USC, Title 28, §347).

Statutes Involved

The statute principally involved is Section 313 of the Federal Power Act, hereinafter sometimes referred to as the "Act", (USC, Title 16, §825 l). Incidentally involved are Section 262 of the Judicial Code (USC, Title 28, §377) and Sections 315 and 316 of the Federal Power Act (USC, Title 16, §825 n and o).

Statement of the Case and the Questions Involved

The Circuit Court of Appeals for the Third Circuit, after hearing and argument and consideration of evidence, issued an order directed to the Federal Power Commission (hereinafter referred to as the "Commission") remanding for determination certain jurisdictional objections raised by respondents in a Petition for Rehearing filed with the Commission, and restraining the Commission from proceeding with a proposed inquiry and investigation of the respondents until such jurisdictional questions are determined by it.

The case arose in the Circuit Court of Appeals on the filing by respondents of a petition calling for the exercise by that Court of powers conferred upon it by Section 262 of the Judicial Code (28 U. S. C. §377), the so-called "all writs" section.* The decree of the Court was prayed for, not as on review of a determination of the Commission, but in the exercise of the Court's limited original jurisdiction, by which it may issue any appropriate writ or process to protect its appellate juris-

* Judicial Code §262: "Power to issue writs. * * * The Supreme Court, the circuit courts of appeals, and the district courts, shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

diction.* Respondents showed, first by their petition, and later by proof formally admitted in evidence, that certain proceedings before the Commission were so conducted as to nullify the appellate jurisdiction of the Circuit Court of Appeals.

The opinion of the court below, which, by its order of March 7, 1938 (R. 63), stands as its findings of fact and conclusions of law, embodies its decision sustaining the contentions of the respondents on the only two questions in this case:

> 1. Has the Circuit Court of Appeals general appellate jurisdiction to review the Commission's order of January 26, 1937?
>
> 2. If the Circuit Court of Appeals has such appellate jurisdiction, was the conduct of the Commission complained of in respondents' petition and shown by respondents' evidence such as to impair or destroy that appellate jurisdiction, so that the Court should issue its process under Section 262 of the Judicial Code to protect that jurisdiction?

The first is a question of law; the second a question of fact. They will be considered in inverse order only because a presentation of the facts is first necessary to the full comprehension of the question of law involved.

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* *McClellan* v. *Carland*, 217 U. S. 268; *Barber Asphalt Paving Co.* v. *Morris*, 132 Fed. 945; *Frankel* v. *Woodrough*, 7 Fed. (2d) 796.

POINT I

THE CONDUCT OF THE COMMISSION WAS DESTRUCTIVE OF THE APPELLATE JURISDICTION OF THE COURT BELOW.*

The admission in evidence before the Circuit Court of Appeals, over the strenuously urged objections of the Commission, of the record of its proceedings, should enable this Court to determine that question of fact on the basis of the record of what transpired before the Commission—free from any possible color of overstatement by respondents on the one hand, or understatement and excuses by the Commission on the other. However, in disregard of the rules of this Court, and to the obvious prejudice of respondents, the Commission has failed to cause that record to be printed—on the excuse that the Solicitor General claims that such record was not in evidence before the Circuit Court of Appeals—this despite the fact that it clearly was offered and admitted in evidence as is shown by the per curiam certificate of the Circuit Court of Appeals dated April 23, 1938, filed in this Court on April 25, 1938, reciting that such record was offered and admitted in evidence before the Circuit Court and considered by it in the order which is the subject of the Commission's appeal.

The full record consists of over 575 pages of the stenographic transcript, more than 1,000 pages of matter incorporated by reference, and a number of exhibits. This stenographic transcript and the exhibits, constituting such record, are on file with the Clerk of this Court, having

* The existence of such jurisdiction is shown under Point II, at pp. 10 to 28, *infra*.

been forwarded to him by the Clerk of the Circuit Court of Appeals in certifying the record of the case to this Court; and respondents respectfully express their hope that the inconvenience caused by the Commission's disregard of the rules in failing to print that record will not deter this Court from seeing for itself, through an inspection of that record, that the conduct of the Commission complained of was even more unfair than it can possibly be shown to have been through mere characterization in this short brief.

The proceedings before the Commission arose in this way:

In 1935, certain proceedings were undertaken by the Pennsylvania Public Service Commission directed to the respondents and four other Pennsylvania corporations, having for their objects the imposition of penalties under the state law for alleged violations thereof. To aid the prosecution of the Pennsylvania Commission's investigations, the Federal Power Commission was called upon to undertake an investigation by which information might be supplied to the Pennsylvania Commission which the latter had no right to obtain under the state law. Upon certain representations of the Governor and the Public Service Commission of Pennsylvania, the Federal Power Commission, by order dated January 6, 1936 (R. 23-4), instituted an inquiry and investigation of the six respondents now before this Court, purportedly to determine the propriety of contracts and working arrangements between respondents and third persons, the charges paid thereunder, and the cost of services to the persons rendering the same (R. 23-26). The respondents then, as now, claimed that the Commission lacked statutory and constitutional power to carry on such investigation. After field

examinations had been made by examiners for the Federal Power Commission, most of whom were in the pay of the Pennsylvania Commission (R. 45-51), a report was submitted by two of them. On the basis and as a result of recommendations contained in that report, the Commission, on January 26, 1937, issued an order (R. 25-7) to the respondents and thirty-five other persons, firms and corporations, requiring affirmative action to be taken by respondents in furtherance of the Commission's investigation.

Respondents, believing themselves aggrieved by this order, promptly attempted to obtain relief therefrom. The remedy which they invoked was that provided by the Federal Power Act,* the Act of Congress by which the Commission's jurisdiction and powers are exclusively conferred and limited. This remedy is first of all an administrative remedy, which has to be exhausted as a prerequisite to the invocation of the second remedy provided by the Act, a judicial review by the appropriate Circuit Court of Appeals.*

The administrative remedy expressly provided in the Act is for the aggrieved parties to file with the Commission a "Petition for Rehearing" in which the grounds of objection are required to be specifically stated. Only on denial by the Commission of the Petition for Rehearing, or if it is granted, upon affirmance by the Commission of all or part of the order against which the Petition for Rehearing is filed, *i. e.*, only upon the completion of the administrative remedy, may the aggrieved parties seek a court review—and then only a review as to the objections specifically stated in their Petition for Rehearing.

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* Federal Power Act, §313, printed in full text in the Appendix hereto.

The objections stated in respondents' Petition for Rehearing (R. 13-29) were as basic as it is possible for objections to be. Respondents therein asserted that the Commission lacks jurisdiction to conduct an investigation concerning the propriety of contracts and working arrangements between respondents and third persons, the charges paid thereunder, and the cost of services to the persons rendering the same; otherwise stated, that the Commission is without jurisdiction of the subject matter of the investigation. Respondents further objected that the Commission was without power to investigate for its *real* purpose of supplying information to a State Commission for use in local proceedings for the imposition of penalties for alleged violations of local law. Finally, it was objected that, as to three of the respondents, the Commission was without jurisdiction of their persons, in the premises, because they are not "public utilities" as defined in the Federal Power Act.*

The day after the Petition for Rehearing was filed, **the Commission adjourned the investigatory hearing under its questioned order, without day.** Shortly thereafter, **the Commission granted the Petition for Rehearing** and assigned the matters involved therein for hearing before it on a day certain. The rehearing commenced by respondents' placing in evidence matters tending to establish the actual objections of the Petition for Rehearing, to wit: the facts showing the true purpose of the investigation, and the facts showing that the business and facilities of

* The Commission's jurisdiction under Part II of the Act (Part I concerning licensees of hydroelectric projects on navigable waters is not here involved) is limited to "public utilities" as defined in the Act, namely electric utility companies owning or operating facilities for the transmission or sale at wholesale of electric energy in interstate commerce.

three of the respondents were such that they were not "public utilities" as defined in the Act, and therefore not subject to the jurisdiction of the Commission in the premises. Respondents were furthermore prepared to present legal argument upon the fundamental legal proposition asserted in the Petition for Rehearing, that there is neither statutory nor constitutional power in the Commission to undertake and carry on the investigation of the subject matter of the investigatory order of January 26, 1937, to which the Petition for Rehearing was addressed.

At the conclusion of respondents' evidence before the Commission, and before argument on the questions of law was ever allowed the Commission's counsel ignored the objections made in the Petition for Rehearing, the hearing on the determination of which was then supposed to be in progress, and proceeded in furtherance of the very investigation under the questioned order, despite the adjournment of hearings thereon by the Commission itself without day.

The trial examiner was entreated to stop the perversion of the rehearing from its proper function, to consider the objections raised by the Petition for Rehearing, and to stop its conversion into a sham "rehearing" which was no more than a masquerade for the investigation itself (R. 7, 8). Such entreaties were unavailing. Likewise unavailing was a verified petition to the full Commission (R. 9, 25-29) to require the discontinuance of the mockery of the administrative remedy of rehearing, by which, under that name, the investigation was being carried forward to completion.

Respondents could do no more before the Commission. Their recourse to administrative protection was both complete and futile. Yet it was apparent to them, as it must

be apparent to this Court, that, had the Commission continued its investigation under the guise of the very rehearing granted to determine whether it had the power to investigate, the determination of that question would be made moot. A court review under such circumstances could likewise relate only to an academic and moot question. **Thus, not only was the administrative remedy of rehearing being frustrated, but the appellate jurisdiction of the appropriate Circuit Court of Appeals was being nullified and destroyed by the Commission's action.**

Because the respondents are Pennsylvania corporations with their busineses in that state, the appropriate Circuit Court of Appeals to review an order of the Commission directed to them is that of the Third Circuit.* In that Court the respondents filed a petition calling attention to the facts stated herein, and praying that the Court exercise its powers by the issuance of appropriate process to prevent the appellate jurisdiction granted to it by Act of Congress from being destroyed by the Commission's action (R. 1-35).

Respondents are content to rest on the record of the proceedings before the Commission and the findings of the court below as more than amply supporting the facts herein stated. These facts were more than enough to warrant the Court's findings** that the conduct of the

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* Section 313(b) of the Federal Power Act provides for a review—"* * * in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia * * *."

** See opinion below, R. 52; R. 63; stenographic transcript of testimony before the Commission, e. g. at pp. 305, 308-9, 326-8, 387-8, 419-20, 439, 441, 464-6, 483-4, 497-8, 505-7.

Commission, of which respondents complained, was destructive of the Court's appellate jurisdiction, and required the issuance of an order (R. 62) neither harsh nor novel under the circumstances—that the Commission proceed with the determination of the objections raised by the Petition for Rehearing.

The judgment of the Court below is in effect only interlocutory in character—remanding the matter as it does to the Commission for ultimate determination. It expressly does not decide the questions raised by the Petition for Rehearing and remaining properly before the Commission for decision. That judgment is the Court's determination of the facts after full consideration of the record of the proceedings before the Commission. As a judgment on those facts it constitutes the exercise of the Circuit Court of Appeals' sound discretion and should not be disturbed.

This decision, after all, requires no more of the Commission than that it proceed as it represented it would proceed, when it continued the investigation without day, granted the Petition for Rehearing, and assigned for hearing the matters involved thereunder.

POINT II

THE CIRCUIT COURT OF APPEALS HAS JURISDICTION TO REVIEW THE COMMISSION'S ORDER OF JANUARY 26, 1937.

We come now to a discussion of the fundamental legal question before the court below—did that court have any appellate jurisdiction to protect? Concededly, if the order of January 26, 1937, to which the Petition for Rehearing was addressed, was not ultimately subject to review by the court below, that Court had no appellate jurisdiction

to protect, and could not issue its process for that purpose.

We submit that the order was clearly reviewable.

Section 313(b) of the Federal Power Act provides:

> "(b) **Any party** to a proceeding under this Act **aggrieved by AN order** issued by the Commission in such proceeding **may obtain a review of such order in the Circuit Court of Appeals** of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."*

Despite the clear language of the statute, the Commission contends that the order is not reviewable. But if there is any limitation on the jurisdiction of the Circuit Courts of Appeals to review the order, such limitation, if it exists at all, must be found in the Federal Power Act itself through a clear limitation on that jurisdiction—a limitation which would permit such grievous injuries as have in this case been suffered by respondents, not only to be inflicted but to be continued in the very face of objection to them.

But the Federal Power Act contains no such limitations. The language vesting jurisdiction in the Circuit Courts of Appeals to review orders is all-inclusive. The subject of review is simply "**AN** order." That no limitation was intended is confirmed elsewhere in Section 313. Thus in paragraph (a) of that section it is provided:

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* Emphasis and parenthetical matter within quotations throughout, ours.

> "* * * No proceeding to review **ANY** order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon."

A careful examination of the report of the Senate Committee on Interstate Commerce, of the minority report of the same Committee, of the report of the Committee on Interstate and Foreign Commerce of the House, and of the conference report of both Houses, concerning the proposed enactment of the Federal Power Act, reveals no statement or intimation of any kind that the language of Section 313 was in any wise intended to be limited, or is to be subjected to any construction other than the literal.

If the Commission's contention is to be sustained at all, it can be sustained only by having this Court read words of limitation into the statute which the Congress did not put there and did not intend to be there. It is almost unbelievable, but nevertheless true, that the Commission seeks to have this Court sit as judicial legislators to alter the language of the statute so that the Commission may continue a course of conduct which *per se* **requires** judicial review, and in effect to enact approval for the very action which nullifies and destroys the appellate jurisdiction of the Circuit Court of Appeals.

Although it is well recognized that statutes providing for appeals are to be broadly construed and not restricted, respondents do not ask for a liberal construction of Section 313 of the Federal Power Act, nor any construction of it at all. None is required. The provisions of the Federal Power Act are clear and unambiguous. As stated in *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269 (1929), at page 277:

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its

> construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. **It is elementary that where no ambiguity exists there is no room for construction. * * * Construction may not be substituted for legislation.***''

The citation of the myriad other authorities to the same effect is surely unnecessary in this Court.

To avoid the demolition of its legal contention which results from a consideration of the plain, unambiguous, and simple language of the statute, the Commission disingenuously resorts to several receding arguments, most of which are largely arguments of nomenclature rather than of substance. It is contended by the Commission:

> (1) that the Federal Power Act contemplates that the review of orders shall be restricted to those made after a hearing and upon a record;
>
> (2) that because the order was not what the Commission calls a "final" order, it is not reviewable. *Jones* v. *Securities and Exchange Commission,* 79 Fed. (2d) 617, and *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 280 Fed. 45, are claimed to be controlling authorities; and
>
> (3) that the order of January 26, 1937, is not an order at all, but a "notice of hearing" or a "sub-

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* Citing *United States* v. *Wiltberger,* 5 Wheat. 76, 95-96; *United States* v. *Fisher,* 2 Cranch 358, 386; *Lake County* v. *Rollins,* 130 U. S. 662, 670; *Caminetti* v. *United States,* 242 U. S. 470; *Ex parte Public National Bank,* 278 U. S. 101; *United States* v. *Colorado & N. W. R. Co.,* 157 Fed. 321, 327.

poena duces tecum", and as such not within the purview of Section 313 of the Federal Power Act. Principally relied on to support this argument is *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82.

These arguments will be considered in the order stated. None of them is sound.

(1) The argument that the Federal Power Act contemplates that "reviewability" be restricted to those orders made after a hearing and upon a record is unsound in basic principle, as well as on authority. The logical pursuit of the underlying theory of this contention leads to an absurdity. It is fallacious because it proceeds on a misconception of the powers of the Commission and their limitations under the Federal Power Act, as well as upon a misapprehension of the rationale of a court review of action taken by an administrative body.

It is indisputable that the Commission is an administrative body of limited powers and jurisdiction. It has no inherent jurisdiction, such as might be claimed for a common law court of general jurisdiction. Its quasi-judicial functions, as well as its other powers, are derived solely from the Act of Congress under which it exists; and which at once prescribes its powers and limits them to those expressly granted. The jurisdiction of the Commission, in the **primary** sense of that word, is limited by the Federal Power Act, both as to the subject matter of action which may be taken by the Commission, and as to the persons with respect to whom such action may be taken. If the power to take a particular action, that is, jurisdiction over a particular subject matter, is not granted by the Act itself, then it cannot exist.

Every affirmative act of a true judicial body, such as a Court of general jurisdiction, implies that the court has ascertained that it has jurisdiction to act; that the status, factual or legal, which must obtain before the court may exercise jurisdiction, has been found by it to exist. *Cf. Cooper* v. *Newell,* 173 U. S. 555; *Manson* v. *Duncanson,* 166 U. S. 533.

It is because an ascertainment of jurisdiction is implicit in every affirmative act of a court, that there is a correlative presumption that jurisdiction, when exercised by a court of **general** jurisdiction, was properly exercised. But in the case of courts of **limited** jurisdiction, there is **no** presumption of jurisdiction arising out of its purported exercise (*McClaughry* v. *Deming,* 186 U. S. 49); although there is the same implicit finding thereof in every affirmative action by such a court. The rule applicable to a merely quasi-judicial body of unquestionably limited jurisdiction, such as is the Federal Power Commission, can be **no more** favorable than that which applies to courts of limited jurisdiction.

Thus the foregoing elementary principles establish that **implicit in every affirmative action of the Commission is the finding, the ascertainment, that it has jurisdiction so to act;** that is, that it has jurisdiction of the subject matter of its action, and of the persons against whom that action is taken.

Affirmative action is taken by the Commission when it makes an order affecting the rights of other persons, particularly where the order constrains such persons to obedience under pains and penalties. The most fundamental of all objections to such an order is that the Commission lacked power to make it because it had no jurisdiction of the subject matter. Such an objection is the most funda-

mental because, if sustained, it destroys the order as such, regardless of how well-founded or wise or expedient it might otherwise be. Compared to an objection of lack of jurisdiction of the subject matter, all other objections to an order of the Commission become secondary.

The Commission's order of January 26, 1937 is an order such as is above described. The petitioners' objections to that order are likewise of the fundamental character above described.

The Commission's argument that a hearing antecedent to an order is the indispensable *sine qua non* of reviewability contends for an absurdity, for it permits of the review of objections of secondary importance and at the same time precludes an effective review of an objection of the most fundamental importance. Such an absurdity cannot be imputed to the Congress as its intent in enacting Section 313 of the Federal Power Act, particularly where such an intent is nowhere discernible from the language of that provision.

All objections to an order based upon the Commission's findings of fact or of law made upon a record are, as above shown, of secondary importance to an objection of lack of jurisdiction of the subject matter. The Commission concedes that where, after a hearing on notice, an order is made embodying the Commission's decision, a party aggrieved may review the order on the mere objection that the Commission acted, not without power, but improvidently because of a misconception of facts or law. Yet on the Commission's basic theory, the absurd result is reached that no court review can be had where, as here, it is the Commission's **action**, rather than its possible decision thereafter, which is the cause for complaint; and no court review can be had where, as here, it is claimed that

the Commission lacks jurisdiction to act at all, providently or improvidently.

Not only is a lack of jurisdiction the most fundamental of all objections, but in this case it is a more serious objection than those which usually arise upon a decision after hearing. **This is true because, for a Commission to act without jurisdiction is not merely improvidence, but an unconstitutional denial of due process of law.** *Twining* v. *New Jersey,* 211 U. S. 78; *Pennoyer* v. *Neff,* 95 U. S. 714; *Scott* v. *McNeal,* 154 U. S. 34; *Wilmington City Ry. Co.* v. *Taylor,* 198 Fed. 159.

Can the Commission still contend that objections to an order on the ground that it constitutes, not only an unlawful exercise of power, but also an exercise of power which is arbitrary and unconstitutional for its denial of due process of law, are not reviewable merely because there was no antecedent hearing, when it admits that any minor objection to an order is reviewable if made after hearing? It is absurd to suppose that a hearing can have the magic effect of justifying such a contention.

Particularly is this true when it is the Commission's *sine qua non,* antecedent hearings, which would nullify any effective court review of the fundamental objections raised by the respondents. We need only to repeat that it is the Commission's action in investigating, rather than any order made at the conclusion thereof, that is the subject of respondents' objections. To hold the hearings in the face of the objections that there is no legal power to do so is to inflict an irreparable injury which cannot be redressed on any court review: for **it is obvious that a subsequent court determination that the investigation should not have been made cannot unmake it. Thus it appears that the Commission's *sine qua non* is the**

very thing which makes ineffective a review of the fundamental objections, and preserves only the review of incidental matters.

Among its many other fallacies, the Commission's theory that a prior hearing is indispensable to a court review misapprehends the function of such review. Court scrutiny of action taken by an administrative body is provided for so that rights may not be infringed and injury inflicted without redress. In arguing, as the Commission does, that only orders made after a hearing are reviewable, the Commission presupposes that only such orders can be injurious. This plainly is not the fact.

It must be evident that where the proceeding, as in this case, is investigatory in character, **the investigation itself may be equally as injurious as any order made at its conclusion, especially where, as here, the Commission may make available to State Commissions any facts found, and the Pennsylvania Commission has instigated this investigation to obtain facts for the prosecution of its own proceedings for the imposition of penalties because the state law does not allow it to do what it asks the Federal Commission to do for it.*** Reasonably, therefore, a court review should be allowed where it is sought to **prevent** the injury, particularly where the injury can never be redressed once it has been inflicted. There is nothing, therefore, in the rationale of reviewability of orders of administrative bodies which would make an antecedent hearing a prerequisite of review. Because the contrary is the fact, the court review provisions of the Federal Power Act, contained in Section 313 thereof, should not be construed as

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* cf. *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407; *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434; *Jones* v. *Securities & Exchange Commission,* 298 U. S. 1.

requiring a prerequisite **which would destroy the very purpose and intent of the statute, and** which construction would **necessarily permit all investigatory orders to be proceeded with, no matter how constitutional rights may be trampled on in doing so.**

We have shown that the basic contentions of the Commission are fallacious and lead but to contradictions and absurdities. A construction of Section 313 of the Federal Power Act which will permit of such contradictions and absurdities obviously should not be indulged in if any other reasonable construction is available. But as heretofore shown (pp. 10-13), the statute on its face, without necessity for any construction, is ample to afford respondents a review of their objections to the Commission's order in question.

The Commission's contention that an antecedent hearing and record are prerequisites to reviewability are the same as those made by the Securities and Exchange Commission and rejected by the Court of Appeals for the District of Columbia in *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission,* 93 Fed. (2d) 236 (App. D. C. 1937). That case decided squarely that orders of the Securities and Exchange Commission denying confidential treatment to information filed are appealable under Section 25(a) of the Securities Exchange Act of 1934. The provisions of this section* are substantially identical with those of Section 313 of the Federal Power Act. The

* "Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court within sixty days after the entry of such order a written petition praying that the order of the Commission be modified or set aside in whole or in part."

Securities Commission expressly took the position, as does the Federal Power Commission here, that a reviewable order "is one entered only after notice and opportunity for hearing and upon a finding of facts." But, answered the Court:

> "Bearing in mind that the present hearing has no relation to the merits—as to which a wholly different situation may result—but is confined solely to the question of our jurisdiction, **we think the position of the Commission is not well taken.**" (p. 238)

It was likewise argued in that case that the order in question was not reviewable because there might be "no transcript to certify and no evidence to balance against findings of fact". This contention was likewise disposed of (p. 241):

> "But this practical difficulty results only from the Commission's interpretation of the pertinent sections, and that interpretation we do not adopt.* Under our construction of the Act there will be a record, and sufficient evidence upon which to test the conclusion reached."

So in the case at bar, although a hearing did not precede the Commission's order of January 26, 1937, there is nevertheless a sufficient record upon which to test the question of whether the Commission lacked jurisdiction to make it. As already pointed out (*supra*, p. 15), the very fact that the Commission **made** the order imports

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* That the court did not hold that a hearing was a prerequisite to a reviewable order is apparent from its discussion of *Miller* v. *United States*, 277 Fed. 95, and of *Baltimore & Ohio* v. *Lambert Run Coal Co.*, 258 U. S. 377, where implicit in the decision of Mr. Justice Brandeis was the conclusion that an order which required no antecedent hearing was reviewable.

the prior ascertainment of all prerequisite jurisdictional facts, and implicit in the order itself is a finding of jurisdiction. The subject matter of the investigation certainly appears of record from the only source where it could properly be stated—the orders of the Commission. The obligations imposed by the order are to be determined from the face of the order itself, and from the Federal Power Act, which surely requires no antecedent record for its construction. There is, therefore, a complete record in this case by which may be tested the objections raised by respondents. The objection as to lack of jurisdiction of the subject matter raises a pure question of law, and even if the Commission deemed it necessary to supplement the record by testimony to support the questioned jurisdiction of the persons of several of the respondents, the Federal Power Act makes ample provision for doing so.* Indeed, in this very case the Commission **at least** represented that it intended to allow the administrative remedy of a rehearing, at which, properly conducted, an ample record can be developed.

Because respondents had no opportunity to consider a brief by the Commission in this Court following the granting of a writ of certiorari, respondents are not aware of all of the contentions which it may make here. In the court below, however, the Commission contended that its order of January 26, 1937, was a mere administrative order in the course of a proceeding and therefore not reviewable. A similar argument was made in the *American Sumatra* case and disposed of by the Court as follows:

> "And we think what was said by Mr. Justice Holmes in Interstate Comm. Comm. *v.* Nor. Pac. Ry., 216 U. S. 538, is applicable to the point we are

* Cf. Section 313(b).

> discussing, that is to say, that we are dealing with an administrative order which it is charged and, for the purposes of this motion admitted, seriously affects property rights, **and if the Commission's present position is right we should be approving a practice which would permit this to be done by way rather of fiat than of adjudication. In such circumstances we think it would be going very far to say that the rights of the parties may not be inquired into by the courts.**" (p. 241)

In passing it may be noted that in the *American Sumatra* case the Court was in much the same position as was the court below,—it was not passing on the merits of objections raised but on the question of whether it had jurisdiction to pass on them in the future. In language most apt to describe the position of respondents, the Court there said:

> "Here the petitions for review allege irreparable injury through the threatened disclosure of the information contained in the applications which the petitioners characterize as trade secrets and the motion to dismiss concedes the truth of this application. In such case it is fundamental that the property rights of the citizen may not be put in jeopardy or destroyed in any proceeding before an administrative board without notice, hearing, and judicial review, and we think it is not correct to say that either the language of the Act or anything which appears in the reports or hearings in Congress justifies the conclusion that Congress intended by the permissive language of Section 24(b) [under which the order was made] to deny the right of review." (p. 239)

(2) In the *Minneapolis Chamber of Commerce* case, *supra*, the plaintiff objected to an order of the Federal

Trade Commission and, upon its objections being overruled by that Commission, attempted to invent an unauthorized method of review by the use of a ceritorari proceeding in a Circuit Court of Appeals to **reverse** that Commission's determination. The Federal Trade Commission Act, under which the order was made, contains no provision for the Court review of the Federal Trade Commission's orders even remotely resembling the provisions of Section 313 of the Federal Power Act. The Court recognized the limitations on its powers inherent in the Federal Trade Commission Act, when it said:

> "The power of the court is limited to the enforcement of the final orders of the commission to cease and desist, upon the application of the commission, and to review of such orders at the request of the party against whom such orders are made • • •." (p. 47)

The Court likewise pointed out that the Federal Trade Commission Act:

> "• • • provides no penalties, nor has the commission power to make more than a finding of facts, which requires confirmation by this court before any burden is cast upon the parties subjected to inquiry." (p. 48)

Not only do these distinctions show that the result reached in the *Minneapolis* case is no guide to the proper result to be reached in this case, but the rationale of the *Minneapolis* case, where the Court noted that the Federal Trade Commission Act provides **no** penalties, emphasizes the necessity for the existence under the Federal Power Act, which **does** provide penalties, of a right of review of Commission orders. The granting to the Com-

mission by the Congress of such plenary powers necessarily must have been intended to have been accompanied by a wider jurisdiction in the Circuit Courts of Appeals to review the Commission's orders than was granted with respect to orders of the Federal Trade Commission in the Federal Trade Act, whereunder no such penalties exist and no such plenary powers are granted.

The difference in the provisions as to court review of Commission orders between the Federal Trade Act, passed in 1914, and the Federal Power Act, passed but recently, may well have been influenced by the concluding statement of the Court in the *Minneapolis* case:

> "It may be desirable that the law should provide for a preliminary review of questions of jurisdiction either by the Circuit Courts of Appeals or by the District Courts; but, in the absence of such provision, we can not assume that power."

As the Court in the *Minneapolis* case recognized that it could not by judicial construction enlarge its statutory powers in order to reach a desirable result, *a fortiori,* this Court should not, in the case at bar, by judicial construction, narrow a clearly granted statutory right of review.

Jones v. *Securities and Exchange Commission,* 79 Fed. (2d) 617 (C. C. A. 2), although relied upon by the Commission, supports respondents', rather than the Commission's, contentions. In the *Jones* case, it appeared that the Securities and Exchange Commission made an order rejecting an application by Jones to withdraw a registration statement previously filed. Jones thereupon applied to the Circuit Court of Appeals for the Second Circuit, for a review of that order. About the same time, the Securi-

ties and Exchange Commission issued a subpoena directing Jones to appear at a hearing in an investigation with respect to his registration statement. Jones refused to obey the subpoena. The Commission proceeded to enforce it in the District Court, and, upon a decision in the Commission's favor, Jones appealed to the Circuit Court of Appeals for the Second Circuit. The two appeals were consolidated, and in a single opinion the Circuit Court refused to review the Commission's order denying withdrawal of the registration statement, and affirmed the judgment of the District Court directing Jones to respond to the subpoena. Certiorari was applied for in both cases, and on the same day was denied in one case but granted in the other.* Thereupon, this Court** reversed the Circuit Court of Appeals and held that the Commission's order refusing to permit withdrawal of the registration statement was arbitrary, illegal and unconstitutional, and directed that the subpoena be quashed. It is clear from the decision that it was unnecessary for this Court to grant both certiorari applications in order to consider and determine the entire case on its merits. If the S.E.C. order was not reviewable, as the Commission argues here, how could this Court have reviewed it in fact, and decided that it was arbitrary, and unconstitutional? It is difficult to see how a more effective review of an order could be had than in a case where this Court's decision effectively condemned and reversed the S.E.C. order.

Indeed, the contentions of the Securities and Exchange Commission in the *Jones* case present striking analogies to those of the Commission in this case, which require similar disposition. The Commission has contended that

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* 297 U. S. 699; 299 U. S. 705.
** 298 U. S. 1.

its order of January 26, 1937 is valid because it is claimed to be within certain general investigatory powers provided in the Federal Power Act (*e. g.*, petition for certiorari, p. 4). That argument is substantially the same as the argument made by the Securities and Exchange Commission in the *Jones* case, that regardless of whether or not it had authority to investigate in connection with the withdrawal of the registration statement (which authority would necessarily fall when the order refusing to allow withdrawal fell), nevertheless, it had the right to make the same investigation under its general powers. This Court overruled that contention saying:

> "The difficulty with that is that the investigation was undertaken for the declared and sole purpose of determining whether a stop order should issue. * * *.
>
> "Nothing appears in any of the proceedings taken by the commission to warrant the suggestion that the investigation was undertaken or would be carried on for any other purpose or to any different end than that specifically named. An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made, and if the purpose disclosed is not a legitimate one, he may not be compelled to answer. Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement, the power of the commission to proceed with the inquiry necessarily came to an end. Disassociated from the only ground upon which the inquiry had been based, and no other being specified, further pursuit of the

> inquiry, obviously, would become what Mr. Justice Holmes characterized as 'a fishing expedition * * * that the chance that something discreditable might turn up' (*Ellis* v. *Interstate Commerce Comm'n,* 237 U. S. 434, 445)—an undertaking which uniformly has met with judicial condemnation." (pp. 25-6)

(3) In the *Illinois Central* case (*supra*) this Court had under consideration a certain notice of hearing, issued by the Interstate Commerce Commission, which the Court refused to review on the grounds that it "had no characteristic of an order, affirmative or negative". As the Court said, it was not "one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree" (p. 89). Merely reading the notice there before the Court immediately reveals that it had none of the characteristics of the Commission's order here in question. So that this may be completely clear, the I. C. C. "order" is quoted *in full:*

> "The above-entitled cases are assigned for hearing October 1, 1915, 10 o'clock a. m., at Hotel Jefferson, St. Louis, Mo., before Examiner Wilson.
>
> By the Commission."

Contrast this three-line notice, which commanded no one to attend the hearing, and, as was pointed out by the Court, constrained no one to obedience, with the lengthy order here under consideration (R. 25-27). The Commission's order is entitled as such, is referred to in itself and in the minutes of the Commission as an **order,** requires the attendance of parties, constrains them to obedience under pains and penalties, both civil and criminal (Federal Power Act, §§315, 316), and orders and directs them not only to appear, but to furnish informa-

tion and data, to take definite action, and to be investigated. It has recitals, following which is a mandate, prefaced by the words "Now, Therefore, **it is ordered**". As was stated by the court below (R. 53):

> "The order has all the affirmative characteristics of a genuine order of the Federal Commission as we think it was intended to be, and constrained the petitioners to obedience at the risk of suffering severe penalties, civil and criminal, embodied in Sections 315 and 316 of the Act, 16 U.S.C.A. §825 n and 825 o."

Under the *Illinois Central* case, the Commission's leading authority, therefore, the Commission's order of January 26, 1937, was exactly what the Commission designated it and intended it to be, namely, an order. It is still that and nothing more, despite the Commission's attempted investiture of it with chameleon-like qualities, which enable it to start life as an order, so denominated, spontaneously transform itself into something "in the nature of a subpoena duces tecum", then make the complete change into "such a subpoena", subject to construction, rules, and authorities as such, and finally resume its character as an order because its usefulness as a "notice" or "subpoena" has ended. Such an attempt by the Commission to obscure the true nature of its order by merely pinning a different label on it so as to prevent its being held reviewable, is too transparent for serious consideration.

Conclusion

In *Jones* v. *Securities and Exchange Commission, supra,* this Court had occasion to point out the dangers of encroachments on private rights resulting from illegal

assumptions of power by the numerous administrative bodies which the Congress has deemed necessary to our government. The arbitrary action condemned in that case, which the Court stated could not coexist with the rule of the Constitution, was no greater abuse than that disclosed to this Court in the case at bar. Fully apposite is this Court's statement in the *Jones* case:

> "To escape assumptions of such [arbitrary] power on the part of the three primary departments of the government, is not enough. **Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well.**"

Only a week ago this Court, in effect, restated the guides for administrative action,* and said:

> "**The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority.** On the contrary, it is in their manifest interest.
>
> "For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, **they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.**"

The record in this case discloses a wide departure by the Commission from those basic concepts.

A determination by this Court that the Commission's order of January 26, 1937 is not a reviewable order would

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* *Morgan* v. *United States,* No. 581, October Term 1937, decided April 25, 1938.

be far reaching in its consequences and implications. **It would mean that any administrative agency of the Government could proceed at any time with any investigation, no matter how injurious, and complete it whether it had the power to do so or not, wholly free of any restraint whatever.**

There would remain no possibility of restraint, even where there had been a judicial determination that the assumed power did not exist. Under this Court's decision in *Meyers* v. *Bethlehem Shipbuilding Corporation* (No. 181, October Term, 1937), it is plain that the District Courts may not afford relief by injunction. **Should this Court determine that what on the face of the statute is an administrative remedy with a right of judicial review, must be construed as excluding from its terms investigatory orders, the sole remaining safeguard against the appropriation of unauthorized power, and of the maintenance of proper standards of administrative action, will be removed.**

That a method for judicial supervision **should** exist is manifest. While there is a presumption that administrative bodies will act properly, there cannot be overlooked the obvious tendencies to arbitrary action which are particularly inherent in investigatory proceedings by administrative agencies. They are at once the prosecutor who calls the proceeding into being, the tribunal before which, as well as by which, the facts are adduced, the court which passes on the relevancy and competency of the evidence, the jury who determine what the facts are, and finally, the judge who makes the decree based on them. As was stated in the recent inaugural address of the President of the American Bar Association, there is reason for concern "* * * **with one body making the rules of the game, playing the game as one of the teams, and**

acting as umpire at the same time, and then writing up the newspaper reports." Such procedure is necessarily one-sided, and requires greater safeguards of judicial supervision than are necessary in the case of true judicial proceedings, where the court has no self-interest in the commencement of the litigation, in the parties to it, or in the result.

Time and again this Court has recognized the dangers which are bound up with broad investigatory powers. It has declared that the purpose of an investigation must be a legitimate one. It has decided that even the development of desirable information cannot validate an investigation unlawful in its inception. It has affirmed:

> "The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow finds no countenance in the American system of government." (*Jones* v. *Securities and Exchange Comm., supra,* at pp. 26-27, 29.)

We respectfully submit that a reversal of the decision of the Circuit Court of Appeals in this case will be tantamount to a declaration by this Court that constitutional or legal restraints upon investigations by Federal administrative agencies, however improper, no longer exist.

THE JUDGMENT UNDER REVIEW SHOULD BE AFFIRMED.

Respectfully submitted,

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Appendix

Federal Power Act, Section 313, in full text:

"Sec. 313(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

"(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Com-

mission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

"(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

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